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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 138.

KENTUCKY WHIP & COLLAR COMPANY, - Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONER.

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KENTUCKY WHIP & COLLAR COMPANY, - *Petitioner,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

BRIEF FOR PETITIONER.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Western District of Kentucky (R. 29-40) is reported in 12 Fed. Supp. 37, and the opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 48-52), which is here under review, is reported in 84 Fed. (2d) 168.

II.

JURISDICTION.

1. The suit is one in equity of a civil nature between citizens of different States, and involves the constitutionality of an Act of Congress approved July

24, 1935 (49 Stat. 494; 49 U. S. C. A., Sections 61-64), commonly known as the Ashurst-Sumners Act, and hence involves a controversy arising under the Constitution and laws of the United States. The matter in controversy, exclusive of interest and costs, was alleged in the bill (R. 2) to exceed the sum of Three Thousand Dollars, and was so found by the District Court (R. 41).

2. The United States Circuit Court of Appeals for the Sixth Circuit, on June 1, 1936, held the Act constitutional in its entirety, and the cause is before this court on certiorari granted October 12, 1936.

3. The statutory provision which is relied upon to sustain the jurisdiction of this court is Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.).

III.

THE ASHURST-SUMNERS ACT.

"An Act to prohibit the interstate transportation of prison-made products in certain cases.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or

in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

"Sec. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

"Sec. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise

shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

"Sec. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act."

IV.

STATEMENT OF THE CASE.

Pleadings.

In this brief petitioner will be hereafter referred to as plaintiff and the respondent as defendant, and, unless otherwise indicated, all italics are ours.

The case was heard in the District Court upon plaintiff's verified bill and petition for a declaration of rights (hereinafter called bill) (R. 1-24), and upon defendant's motion to dismiss the bill (R. 24-25). The bill alleged the following facts:

The plaintiff, Kentucky Whip & Collar Company, is a Kentucky corporation engaged in the business of manufacturing with convict labor at Eddyville, Kentucky, horse collars, harness and strap goods, and in marketing same in the different States of the Union.

The defendant, Illinois Central Railroad Company, is an Illinois corporation, engaged in the business of a common carrier by rail, with a line of railroad serving Eddyville, Kentucky, and is the principal carrier of the plaintiff's products to its customers. Prior to filing the bill plaintiff had tendered to the defendant at its freight station at Eddyville, Kentucky, twenty-five separate shipments of collars and harness manufactured by the plaintiff with prison labor at its plant in Eddyville, Kentucky, for the purpose of having these shipments transported by the defendant to the consignees thereof, each of whom was located in a State other than Kentucky. Ten of these shipments were consigned to customers in ten different States, each of whose laws prohibit the sale within the borders thereof of any goods or merchandise manufactured or produced wholly or in part by convict labor. Five of the shipments were consigned to States whose laws do not prohibit the sale therein of convict-made goods, but do require that any such goods exposed for sale or sold shall be plainly marked so as to indicate that they are convict-made. Ten of the shipments were consigned to States whose laws imposed no restriction upon the sale or possession of convict-made goods within those States. All of the tendered shipments were for the purpose of filling *bona fide* orders theretofore received by the plaintiff. None of the packages or articles therein contained bore any mark, label or brand thereon to indicate that the goods contained therein were manufactured or produced with prison

labor. The defendant refused to accept the shipments and to transport same, and upon each bill of lading endorsed the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Plaintiff's products are useful articles of commerce, and are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used. It will be the policy of the defendant to refuse any shipments from the plaintiff of its prison-made articles where to accept and transport such shipments will violate the terms of the Act of Congress approved July 24, 1935, and the continued refusal of the defendant to accept the shipments tendered and similar shipments will operate to practically destroy plaintiff's business, which is largely of an interstate character.

The bill charged that the Act is violative of the Constitution of the United States in the following particulars:

(a) It is not a valid exercise of the power conferred upon Congress by the commerce clause of the Constitution.

(b) It is an unconstitutional attempt on the part of Congress to deal with matters reserved to the States and to the people by the Tenth Amendment.

(c) It is violative of the Fifth Amendment, in that it deprives the plaintiff of its property, including its right to do business in interstate commerce, without due process of law.

(d) It is an unconstitutional attempt on the part of Congress to so exercise its power to regulate interstate commerce as to permit the respective States, under the protection of said Act, to prohibit and regulate interstate transactions between their inhabitants and the inhabitants of other States with reference to useful and harmless articles of commerce.

The relief asked was that the defendant be mandatorily enjoined and required to accept and transport each of the enumerated twenty-five shipments, and all future shipments of a similar character which may be tendered to it by the plaintiff, and further for a binding declaration of rights, adjudging that the Act is violative of the Constitution of the United States for the reasons above stated.

Rulings of the Lower Courts.

The District Judge found the facts as alleged in the bill (R. 40-42). His conclusions of law (R. 42-43), pertinent to this appeal, were:

1. That the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which prohibit the sale or possession of convict-made goods, is beyond the constitutional power of Congress; but in so far as the Act prohibits the shipment of convict-made goods into those States which require that such goods shall be so labeled before being sold or offered for sale as to indicate that they are convict-made, unless such goods are so labeled before interstate ship-

ment, is a valid exercise of the power of Congress under the interstate commerce clause of the Constitution.

2. That Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, before shipment, be so labeled as to indicate that they are convict-made, and the name and location of the prison where made, as is required by Section 2 of the Act.

3. That Section 2 of the Act is separable and is valid and enforceable, notwithstanding the indicated invalidity of some of the provisions of the Act, and that that portion of Section 1 of the Act which operates to prohibit shipment in interstate commerce of unlabeled convict-made goods into those States prohibiting the exposure for sale or sale of convict-made goods unless so labeled is also separable from the invalid part of Section 1 of the Act, and is valid and enforceable.

4. That as the plaintiff did not label the articles shown by the bill to have been tendered to the defendant for shipment into those States requiring convict-made articles to be so labeled before sale or exposure for sale, so as to conform to such State requirements, the defendant was not required to accept such shipments and to transport same to their destination, irrespective of the provisions of Section 2 of the Act.

5. That as the plaintiff did not label any of the containers of any of the shipments set out in the bill, as required by Section 2 of the Act, defendant was not

required to accept any of said shipments and to transport the same.

The decree denied plaintiff the relief sought, and dismissed the bill (R. 43).

On appeal, the decree of the District Court was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit (R. 48), that court holding the Act constitutional and valid in its entirety (R. 48-52).

V.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

As disclosed by the petition for a writ of certiorari herein, the plaintiff will urge and rely upon the error of the Circuit Court of Appeals in holding the entire Act constitutional and valid, and upon the following errors set out in its assignment of errors in the District Court (R. 45-46):

"1. The court erred in holding that the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which require that convict-made goods shall be so labeled as to indicate that fact before being sold or offered for sale, unless such goods are so labeled before interstate shipment, is a valid exercise of the power of Congress under the Constitution.

"2. The court erred in holding that Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, be-

fore shipment, be so labeled as to indicate that they are convict-made, and the name and location of the prison where made, as required by section two of the Act of July 24, 1935.

"3. The court erred in holding that section Two of the Act is separable, and is valid and enforceable, notwithstanding the invalidity of that part of section One of the Act which operates to prohibit the shipment in interstate commerce of convict-made goods into those States where the sale of convict-made goods is prohibited by the law of such States.

"4. The court erred in holding that that part of section One of the Act which operates to prohibit the shipment in interstate commerce of unlabeled convict-made goods into States requiring such goods, before sale or exposure for sale, to be so labeled as to indicate that they are convict-made, is separable, and is valid and enforceable, notwithstanding the invalid portions of section One of the Act.

"5. The court erred in holding that the defendant was not required to accept the shipments alleged in the bill to have been tendered to defendant for transportation to and delivery in those States whose laws require convict-made goods to be labeled as convict-made before sale or exposure for sale."

VI.

ARGUMENT.

It is quite evident that Congress sought to justify the legislation here involved under the commerce clause of the Constitution. Under its terms shipments to States which prohibit the sale of convict-made goods therein are absolutely prohibited if intended for sale in such States. Shipments into those States which require that goods made with convict labor shall be so labeled as to indicate that fact before exposure for sale are prohibited if the articles contained in such shipments are intended by those interested therein to be sold or exposed for sale without being so labeled. Thus, Congress has undertaken to make the right of a citizen of one State to sell and ship useful and harmless convict-made goods to a citizen of another State dependent upon the laws of the latter State. The validity of this legislation, in so far as it operates as an absolute prohibition of the shipment of useful and harmless articles of commerce from one State to another, depends upon whether or not Congress, under the commerce clause, possesses the power to prohibit such movement independently of any prohibitory State law; and its validity, in so far as it operates to require useful and harmless convict-made articles to be labeled to conform to the laws of the State of destination, likewise depends upon whether or not Congress, under the commerce clause, has the power to require such

labeling independently of any State law. State law, of course, adds nothing to the power of Congress.

> "Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted." *C. L. Ashton, et al.,* v. *Cameron County Water Improvement District No. One,* —— U. S. ——, decided May 25, 1936.

We therefore come to a consideration of the power of Congress, first, to absolutely prohibit the movement in interstate commerce of useful and harmless convict-made articles of commerce; second, to the power of Congress to require as a condition precedent to the movement of such articles in interstate commerce that they be labeled so as to indicate that they are convict-made; and, third, to the power of Congress to require as a condition precedent to the movement of such articles in interstate commerce that their containers be so labeled.

POINT 1.

Congress Cannot Prohibit the Movement in Interstate Commerce of Useful and Harmless Articles of Commerce Made by Convict Labor.

We have no disposition to question the plenary power of Congress to regulate interstate commerce; but this court more than once has emphatically declared that the power is one of *regulation*—not of *prohibition.*

In the case of *Hammer* v. *Dagenhart,* 247 U. S. 251,

this court, in defining the nature and extent of the commerce power of Congress, said (p. 269):

> "In *Gibbons* v. *Ogden,* 9 Wheat. 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said: 'It is the power to regulate; that is to prescribe the rule by which commerce is to be governed.' In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. *They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is, as to them but the exertion of the power to regulate.*"

Notwithstanding the well-established rule that the power of Congress under the commerce clause is that of *regulation,* not of *prohibition,* this court in a long line of cases has recognized that the regulation of interstate commerce in certain articles and as to certain practices, which are inimical to the health, safety, morals or general welfare of the public can only be accomplished by prohibiting the use of the instrumentalities of interstate commerce in the transportation

of such articles, or in facilitating and making effective such practices. In the case of *Hammer* v. *Dagenhart, supra,* the principle underlying these cases is thus explained (p. 271):

> "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended."

Cases illustrating the application of this principle are: *Champion* v. *Ames,* 188 U. S. 321, sustaining a federal law prohibiting the transportation in interstate commerce of lottery tickets; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, upholding a statute prohibiting the transportation in interstate commerce of impure or misbranded foods or drugs; *Hoke* v. *United States,* 227 U. S. 308, sustaining a federal statute prohibiting the transportation in interstate commerce of women for immoral purposes; *Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 U. S. 311, sustaining the Webb-Kenyon Act, which prohibits the transportation in interstate commerce of intoxicants intended to be used, possessed or sold in violation of the laws of the State of destination; and *Brooks* v. *United States,* 267 U. S. 432, sustaining the Dyer Act, making it a crime to knowingly transport in interstate commerce a stolen automobile. In every one of those cases the prohibition was justified by the court, not because of any power

in Congress to prohibit the movement in interstate commerce of ordinary articles of commerce, but as an *exercise of the power to regulate,* prohibition in those particular cases being necessary in order to accomplish regulation; and *each of those cases dealt with statutes closing the channels of interstate commerce to articles which, because of their inherent nature or their intended use, were inimical to the health, safety, morals or general welfare of the public, or with statutes closing the channels of interstate commerce to practices or acts criminal in nature or inimical to the health, safety, morals or general welfare of the public.* It is well settled, however, that no such power to regulate through prohibition can be exercised with reference to useful and harmless articles of commerce. As to such articles no regulation will be sustained, *where the regulation has no reasonable relation to facilitating or protecting interstate commerce.* The cases just referred to, and others of similar import, afford no support for the claim of power to prohibit the movement in interstate commerce of harmless articles. On the contrary, the reasoning used in those cases is direct authority against the existence of any such power.

In the case of *Clark Distilling Co.* v. *Western Maryland Railway Co., supra,* as above stated, there was involved the constitutionality of the Webb-Kenyon Act, and it was strenuously urged upon the court that to sustain that Act would amount to a construction of the commerce clause of the Constitution enabling Congress to close the door to the interstate transportation of *any* article of commerce which any State, under

the attempted exercise of its police power, might outlaw or burdensomely regulate, however harmless such article might be. The court answered that contention in this language (p. 332):

> "The want of force in the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, *the subject regulated and the extreme power to which that subject may be subjected.* The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guarantees such enlarged power could not be applied. In other words, *the exceptional nature of the subject here regulated* is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace."

Thus it is clear that Congress, under the commerce clause, cannot as an exercise of its independent will in the regulation of commerce or in order to accommodate its regulations to State laws, prohibit interstate commerce in useful and harmless articles. In the exercise of its power to regulate commerce, just as in the exercise of all its other great substantive pow-

ers, Congress is subject to the Fifth Amendment. This was expressly held by this court in the case of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 589. In Note 19 to that case Mr. Justice Brandeis cites a number of cases supporting the statement in the opinion that all the great substantive powers of Congress must be exercised with due regard to the Fifth Amendment, and among others he cites cases showing that such restriction applies to the exercise of the power to regulate interstate commerce. Therefore, no legislation of Congress under the commerce clause is valid if it operates to deprive a citizen of his property without due process of law. The term "property," as used in the due process clause of the Fifth Amendment, has the same meaning as attaches to it in the due process clause of the Fourteenth Amendment; *Coolidge* v. *Long*, 282 U. S. 582; *Heiner* v. *Donnan*, 285 U. S. 312; and is not restricted to tangible articles alone. The right to do business is property. The right to do business without unconstitutional regulations is property. The right to own property, to use it and sell it free of restrictions which would impair its sale value or its enjoyment is protected by the Fifth Amendment against national action, just as it is protected by the Fourteenth Amendment against State action, if the property is not of that inherently evil or harmful character, or capable of lending itself to evil or harmful uses justifying the exercise of the police power in relation thereto.

So, in its final analysis, this case comes down to the question of whether convict-made goods are in and

of themselves detrimental to the health, safety, morals or general welfare of the public, or are adapted to uses which will injuriously affect the health, safety, morals or general welfare, and therefore fit subjects for the exercise of the police power. Of course, within the States Congress does not possess police power as an independent substantive power. We recognize, however, that *in the good faith exercise of its granted powers,* Congress may *incidentally* accomplish the same purposes the States may accomplish in the exercise of their police power. That is to say, in the *legitimate* exercise of its power to *regulate commerce,* Congress may restrict or prohibit the movement in interstate commerce of those articles of commerce which because of their inherent character, or because of the use for which they are designed, are calculated to injuriously affect the health, morals, safety or general welfare. *However, as applied to the power of Congress in this respect, Congress has no power to look beyond the article itself. It can consider only the inherently evil or harmful qualities of the article itself, or the evil or harmful uses for which it is designed. It has no power, in framing its legislation under the commerce clause, to consider the evils, if any there be, in the manufacture and production of the article, because these activities are beyond the reach of congressional power.* Neither manufacture nor production is commerce of any character. The power of Congress under the commerce clause does not attach to the article *until it has started on its interstate journey or been delivered to a carrier for interstate trans-*

portation. If any power resides anywhere to regulate the manufacture or production of these articles, that power is in the State, not in the national government. It has been so held by this court in an unbroken line of opinions almost from the beginning of the Republic down to and including the very recent opinions of this court dealing with so-called New Deal legislation, purporting to have been enacted under the commerce clause. *Kidd* v. *Pearson,* 128 U. S. 1; *United States* v. *E. C. Knight Co.,* 156 U. S. 1; *Delaware, Lackawanna & Western R. Co.* v. *Yurkonis,* 238 U. S. 439; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344; *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210; *Schecter Poultry Corporation* v. *United States,* 295 U. S. 495; *United States* v. *William M. Butler,* 297 U. S. 1; *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

Congress, in exercising its power to regulate interstate commerce, must confine itself to interstate commerce, or such local activities as directly affect interstate commerce. It cannot, through a pretended exercise of its power, deal with what it may consider evils in the manufacture or production of articles of commerce. Such was the question decided by this court in the case of *Hammer* v. *Dagenhart,* 247 U. S. 251, heretofore referred to, and such was one of the evils in the National Industrial Recovery Act, the Agricul-

tural Adjusfment Act and the Guffey Coal Bill, which brought about their condemnation by this court.

Therefore, if this Act can be upheld as to the plaintiff, it must be upon the theory that the horse collars and harness made by it with convict labor are intrinsically harmful either to the public health, morals, safety or general welfare, or that they are adapted to uses harmful to the public health, morals, safety or general welfare. We cannot conceive that even the defenders of this law will have the temerity to contend that the articles manufactured by the plaintiff are intrinsically harmful either to the public health, morals or safety. It is inconceivable that horse collars and harness made by convict labor, by reason of any intrinsic qualities, can any more affect the public health, morals or safety than can goods made in factories every employee of which is a member of the American Federation of Labor. Neither can it be successfully argued that there is anything intrinsic in convict-made horse collars and harness tending to make them detrimental to the general welfare. Within themselves they are no more detrimental to the general welfare than they are to the morals, health and safety of the public. If they can be considered detrimental to the general welfare in any way whatever, it is not because of anything inherent in the articles themselves, but because of their manufacture by convict labor in competition with free labor; and this brings us back again to the proposition that regulation on the part of Congress, for the purpose of hampering, prohibiting or in any manner embarrassing or burden-

ing the manufacture of these articles is an invasion of a field denied to Congress by the Constitution. The principle involved in this case cannot be distinguished from that involved in *Hammer* v. *Dagenhart*. The court in that case distinctly held that articles made by child labor are in themselves harmless, and that the real purpose of the Act involved in that case was to regulate the manufacture of goods by child labor, and inasmuch as the power of Congress over the article itself does not attach until it is actually delivered to the common carrier for transportation in interstate commerce, or until the actual commencement of its journey to another State, Congress is without power to reach back to its method of manufacture as a basis for prohibiting its movement in interstate commerce. As observed by the court in that case (pp. 272, 273):

> "If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States."

On the oral argument of this case in the Circuit Court of Appeals, counsel for the defendant argued that the Child Labor Act involved in *Hammer* v. *Dagenhart* was essentially different from the Act here involved, in that the Child Labor Act was an absolute prohibition against movement in interstate commerce of the interdicted articles, while under the law here in-

volved the prohibition is against movement in interstate commerce only when such movement has for its purpose a violation of the laws of the State of destination. We are unable to see how such a distinction helps defendant's case. In view of the language of this court in *Hammer* v. *Dagenhart,* it cannot be doubted that the same conclusion would have been reached by the court had the law there involved prohibited the shipment only when the article was consigned to States that prohibited the employment of child labor. In such a case the real matter controlled and reached by the Act of Congress would have been the method of production—the very thing which *Hammer* v. *Dagenhart* holds is no legitimate concern of Congress. Congress was seeking the same end in the enactment of the Child Labor Act as was sought to be accomplished in the enactment of the Act here under consideration, and that end was the protection of presumably adequately compensated labor from competition with cheaper labor. In the Child Labor Case Congress proceeded upon the generally accepted theory that child labor is paid less than adult labor. Here Congress has proceeded upon the justified assumption that convict labor is paid less than free labor. If Congress does not possess the power under the commerce clause to close the channels of interstate commerce entirely or temporarily to merchandise manufactured by child labor, how can it be said it possesses any such power with reference to merchandise manufactured by convict labor? The result flowing from the merchandising of the product of either of these

two kinds of labor is to bring cheap labor in competition with better paid labor. In the *Dagenhart* case, however, this court said that the commerce power of Congress cannot be used to protect against this character of competition.

No doubt those seeking to sustain the law here involved will lean heavily upon the case of *Whitfield* v. *State of Ohio,* 297 U. S. 431. That case reached this court on certiorari to the Supreme Court of the State of Ohio, to review a judgment of that court affirming a judgment of the Court of Appeals of the Eighth District, Cuyahoga County, affirming a conviction of Whitfield in the Municipal Court of Cleveland for violating a statute of the State of Ohio, which, in part, provides:

> "After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other State by convicts or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this State."

The State statute also fixes penalties for a violation of its terms.

The information under which Whitfield was proceeded against contained two counts, the first one charging that Whitfield on a day named had, in the City of Cleveland, Ohio, sold on the open market a dozen Chambray men's work shirts, which had been manufactured in whole or in part by convicts in the State prison of Alabama. The second count charged Whitfield with unlawfully selling for shipment to R.

C. Kissack, via railway express from Wetumpka Prison in the State of Alabama to said Kissack in Lakewood, Ohio, six dozen Chambray men's work shirts manufactured by prisoners confined in the Wetumpka Prison. The case was tried on a stipulation of facts, which, as stated by this court, were "substantially the same as those set out in the information, with the addition, in respect of the first count, that the goods were sold in the original package as shipped by interstate commerce into the State of Ohio, and that there is nothing harmful, injurious or deleterious about the goods sold; that the six dozen shirts mentioned in the second count were not delivered to Kissack at the time of sale, but were to be shipped to his residence in Lakewood, Ohio, by railway express from the prison in Alabama." Whitfield was convicted on both counts; that conviction was affirmed by the Court of Appeals of Ohio for the Eighth District, and a petition in error to the Supreme Court of Ohio was dismissed by that court on the ground that no debatable constitutional question was involved.

The Ohio law involved in that case was undoubtedly passed and its effective date timed to coincide with the effective date of the Hawes-Cooper Act, which was approved January 19, 1929 (45 Stat. 1084; 49 U. S. C. A., Section 60). Section 2 of the Hawes-Cooper Act provides that it shall become effective five years after the date of its approval, which made it effective on January 19, 1934. That Act provides that when goods or merchandise, manufactured or produced in whole or in part by prison labor, are transported into any State

or Territory for use, consumption, sale or storage therein, such articles shall, upon arival and delivery in such State or Territory, be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such merchandise had been manufactured or produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise. It will be observed that that Act closely follows the Wilson Act. It subjects interstate shipments of prison-made goods to State control at the same point as interstate shipments of liquor are subjected to State control under the Wilson Act, as construed in the case of *Rhodes* v. *Iowa,* 170 U. S. 412, namely, upon receipt by the consignee.

We are not advised as to all of the constitutional questions attempted to be raised by Whitfield in the State courts of Ohio, but we *are* advised as to just what constitutional questions this court found were presented to it by the record. The court had this to say on that subject:

> "Petitioner assails the constitutional validity of the Ohio statute and also of the Hawes-Cooper Act. The record fails to show that the points made by petitioner in this court were properly raised in the trial court. But it sufficiently appears from the opinion of the appellate court that that court considered and passed upon the following contentions: that the Ohio statute abridged the privileges and immunities of petitioner as a citizen of the United States in violation of the Fourteenth

Amendment, by depriving him of the privilege of selling goods, manufactured in Alabama by prison labor, in competition with citizens of Ohio engaged in selling like goods; that the Ohio statute constituted an unauthorized regulation of and a burden upon interstate commerce; and that the Hawes-Cooper Act constituted an unlawful delegation of the power of Congress to the States. These questions, therefore, are properly here for consideration."

In view of the foregoing language, we have the right to conclude that this court considered no other questions, because, according to the opinion, no other questions were open for consideration on the record presented. The court rather summarily disposed of the first and last of the constitutional questions presented by the record. The court further held that a very serious constitutional question would be presented if the Ohio statute should be construed to prohibit such transactions as that covered by the second count of the indictment. For the reasons stated in the opinion, however, it was found not necessary to pass upon the constitutional power of the State to convict Whitfield on that count. After thus disposing of the second count, the court took up the question of whether the State statute, in so far as it attempts to prohibit the consignee of an interstate shipment of convict-made goods from selling same in the original package, constitutes a burden upon interstate commerce. A solution of that question, of course, involved a determination of the power of Congress to divest such shipments

of their interstate character after receipt by the consignee. The court pointed out that the Hawes-Cooper Act is, in substance, the same as the Wilson Act, and in this connection used this language:

> "That act is in substance the same as the Wilson Act with respect to intoxicating liquors, passed August 8, 1890, chap. 728, 26 Stat. at L. 313, U. S. C. A. title 27, section 121, as construed and upheld by this court. *Rhodes* v. *Iowa,* 170 U. S. 412, 421-423, 426, 42 L. Ed. 1088, 1094-1096, 18 S. Ct. 664; *Re Rahrer,* 140 U. S. 545, 559, 560, 562, 564, 35 L. Ed. 572, 575, 576-578. In effect, both acts provide (the one as construed and the other in terms) that the subject matter of the interstate shipment shall, upon arrival and delivery in any state or territory, become subject to the operation of the local laws as though produced in such state or territory; and shall not be exempt therefrom because introduced in original packages. Each statute simply permits the jurisdiction of the state to attach immediately upon delivery, whether the importation remain in the original package or not. In other words, the importation is relieved from the operation of any rule which recognizes a right of sale in the unbroken package without state interference—a right the exercise of which never has been regarded as a fundamental part of the interstate transaction, but only as an incident resulting therefrom. *Rhodes v. Iowa, supra* (170 U. S. 420, 423, 424, 42 L. Ed. 1094, 1095, 18 S. Ct. 664). The interstate transaction in its fundamental aspect ends upon delivery to the consignee."

We respectfully submit that this language, when considered in connection with the two cases of *Re Rahrer* and *Rhodes* v. *Iowa,* was adequate to completely dispose of the question then under consideration, and did completely dispose of it.

Re Rahrer, 140 U. S. 545, cited by the court, directly involved the constitutionality of the Wilson Act. In that case the court held that in the absence of permissive congressional legislation, an interstate shipment of an article is protected against State action up until its receipt by the consignee, and, if sold by him in the original package, until such sale has been completed and delivery thereof made. This principle, as indicated by the court, is bottomed upon the proposition that articles moving in interstate commerce are beyond the reach of State authority (with the exception of regulations in the nature of inspection and health measures) until they have become incorporated into the general mass of property in the State of destination. On this point the court said (p. 562):

> "The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State. 12 Wheat. 448.
>
> "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

It is apparent from the foregoing language that the court was of the opinion that it is within the competency of Congress to divest articles shipped in interstate commerce of their interstate character upon the receipt thereof by the consignee and before he sells same, even though when sold the article is in the original package. It is equally clear that this power of Congress was not considered by the court to be confined to those articles of commerce which are fit subjects for the exercise of the police power. The *Rahrer* case contains no language indicating that the exertion of this power of Congress is confined to such articles. That case is ample authority for the proposition that the right of the consignee of an interstate shipment to sell same in the original package, free from the interference of State law, is such a mere incident of interstate commerce that it can be safely surrendered to the control of the respective States without impairing the fundamental essentials of interstate commerce so necessary to be kept under the exclusive authority of the national government; and that this was the basis for the decision in that case is clearly shown by a further discussion of the principle in the case of *Rhodes* v. *Iowa*, 170 U. S. 412. In that case the court, in discussing the rule that in the absence of permissive congressional legislation the consignee of an interstate shipment is entitled to sell same in the original package free from State control, but that Congress can confer upon the States the right to regulate such sales, had this to say (pp. 423, 424):

"The words 'original packages' had, at the time of the passage of the act by the decisions of this court, acquired with reference to the construction of the Constitution a technical meaning, signifying that the merchandise in such packages was entitled to be sold within a State by the receiver thereof, although State laws might forbid the sale of merchandise of like character not in such packages.

"Whilst it is true that the right to sell free from State interference interstate commerce merchandise was held in *Leisy* v. *Hardin* to be an essential incident to interstate commerce, *it was yet but an incident, as the contract of sale within a State in its nature was usually subject to the control of the legislative authority of the State.* On the other hand, the right to contract for the transportation of merchandise from one State into or across another *involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State.*"

We submit, therefore, that the two cases of *Re Rahrer, supra,* and *Rhodes* v. *Iowa, supra,* clearly establish: First, that Congress, without being guilty of delegating any of its power under the commerce clause, may divest an article shipped in interstate commerce of its interstate character after its delivery to the consignee and before sale in the original package; and, second, while the two opinions referred to dealt with a law thus divesting intoxicating liquors of

their interstate character, they clearly show that the character of the article has nothing to do with the exercise of the power, and that therefore the power may be exercised with reference to useful and harmless articles of commerce, as well as with reference to articles which are commonly considered as fit subjects for the exercise of the police power. Indeed, *it is very doubtful if* there is any really sound basis for the proposition that interstate commerce was intended by the framers of the Constitution to protect the consignee of an interstate article in the sale thereof in the original package. Logically, it would appear that an interstate transaction involving the sale of merchandise is concluded when the article had been delivered to the consignee. State regulation of the sale or the use of the article after its receipt by the consignee can, at most, only indirectly and incidentally affect interstate commerce in its fundamental essentials. The idea that interstate commerce protects the consignee in original package sales apparently grew out of the opinion of this court in the case of *Brown* v. *Maryland,* 12 Wheat. 419, 446, 447. *In that case, however, the court was not dealing with commerce among the States.* It was dealing with immunity from State taxation of imports from foreign countries under Paragraph 2 of Section 10 of Article 1 of the Constitution. After holding that such imports are free from State taxation, except to the extent and in the manner provided by the Federal Constitution, Chief Justice Marshall in his opinion used this language (p. 449):

> "It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State."

This language of the great Chief Justice is subject to two criticisms: First, articles shipped from one State to another are not imports within the meaning of the Constitution; and, second, the quoted language is dicta; and both of these criticisms of the quoted language were made by this court in *Woodruff* v. *Parham,* 8 Wall. 123. This latter case fully sustains our view that the commerce clause of the Constitution does not confer upon the consignee of an interstate shipment the right to sell same in the unbroken package free of non-discriminatory State regulations or burdens. Such was also the conclusion of this court in the case of *Hinson* v. *Lott,* 8 Wall. 148.

The opinion in the more recent case of *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, contains a very thorough discussion of the power of the States to impose a non-discriminatory tax upon goods brought in from other States while still in the original package. In that case the court reaffirmed the rule laid down in *Woodruff* v. *Parham, supra,* and the cases following it, that such merchandise, or the sale of same, may be the subject of a non-discriminatory tax; and it seems to us that opinion lends very strong support to our view *that interstate commerce in articles shipped from one State to another ends with the delivery of the article to the consignee.* At any rate, whether such is the correct rule or not, it seems quite clear from the cases

of *Re Rahrer, supra,* and *Rhodes* v. *Iowa, supra,* that Congress has the power to divest such articles of the protection of interstate commerce upon receipt by the consignee. If we are correct in our analysis of those two cases, then the power of Congress to enact the Hawes-Cooper Act is clear, and we respectfully submit it was unnecessary for the court in the Whitfield case to enter into any consideration of the nature of convict-made goods or the effect they may have upon free labor when sold in competition with the products of free labor, and we respectfully submit that the discussion of these questions in the Whitfield case should not be permitted to weigh against our contentions in this case. This is especially true, in view of the fact that if what we consider to be *dicta* in the Whitfield case is accepted as binding in this case, then this court must wholly disregard two other of its well-considered opinions. We refer to the cases of *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, and *Hammer* v. *Dagenhart,* 247 U. S. 251. Neither of those cases was expressly overruled by the Whitfield case, nor is there any language in that opinion indicating that the court intended to impair the force of those cases as authority on the questions of law therein dealt with.

The opinion in the *Clark Distilling Company* case shows beyond any sort of question that the Webb-Kenyon Act was sustained *solely because of the nature of the article* (intoxicating liquor) *therein dealt with. It was justified by the court on that ground and on that ground alone, and the opinion contains an*

emphatic warning to Congress, and an equally emphatic assurance to the citizens of this country, that the power of Congress under the Constitution to regulate interstate commerce does not extend to prohibiting or limiting the interstate movement of useful and harmless articles of commerce. Such was also the ruling in the case of *Hammer* v. *Dagenhart, supra,* and in that case the court held by the clearest kind of implication, if not in actual language, that the power of Congress to prohibit or limit the movement in interstate commerce of articles of commerce is restricted to those articles which, because of their inherent nature or the use for which they are intended and adapted, are inimical to the public health, morals or safety, or to the general welfare; *that when Congress undertakes to deal with an article moving in interstate commerce, or offered for movement in interstate commerce, it is restricted to dealing with the article itself. It cannot enlarge its power by considering the origin or method of production of the article.* These are matters beyond the reach of the national government.

In the Circuit Court of Appeals counsel for the defendant relied upon the cases of *Weber* v. *Freed,* 239 U. S. 325; *Scharrenberg* v. *Dollar Steamship Co.,* 245 U. S. 122, and *Church of Holy Trinity* v. *United States,* 143 U. S. 457, in support of their claim that Congress has the power to prohibit the shipment of convict-made goods in interstate commerce in order to protect the free labor of the country against unfair and ruinous competition. Those cases, however, have no bear-

ing whatever on the question here presented. *They involved the power of Congress to regulate commerce with foreign countries—a much broader power than the power of Congress to regulate commerce among the States.* Congress has the power to absolutely prohibit commerce with foreign countries. In dealing with such commerce Congress is not restrained by the due process clause of the Fifth Amendment, or by any other provision of the Constitution. It is thoroughly settled that no person has a vested right to engage in foreign commerce. See: *Butfield* v. *Stranahan,* 192 U. S. 470; *Brolan* v. *United States,* 236 U. S. 216; *The Abby Dodge,* 223 U. S. 166; and also *Scharrenberg* v. *Dollar, supra.*

Here, as in the lower court, counsel for the defendant will doubtless refer to certain federal statutes, regulating and prohibiting the interstate shipment of the dead bodies of game animals and game birds killed or possessed in violation of State law. Those statutes are all parts of the Act of May 25, 1900, commonly known as the Lacey Act, typical examples being Sections 392, 393, 394 and 395, Title 18, U. S. C. A. Those statutes deal with situations not at all analogous to the one here involved. Section 392 prohibits the transportation in interstate commerce of wild animals or birds killed or shipped in violation of the laws of the State, territory or district where killed or from which they are shipped. Section 393 requires all packages containing dead bodies or plumage, or any part thereof, of game animals or game or other wild birds to be plainly marked so as to indicate the contents and the

name and address of the shipper, when shipped in interstate commerce. Section 394 provides penalties, and Section 395 provides that the dead bodies of such game animals, or game or wild birds, shall be subject to the laws of the State upon arrival therein, to the same extent and in the same manner as though such animals or birds had been produced in such State or territory, regardless of whether such shipments are in the original packages or otherwise. It is the theory of the law, repeatedly announced by this court, that wild life is the property of the State in which it is found, and that therefore the State can place such restrictions upon the taking or the killing thereof as the Legislature may determine. *Carey* v. *South Dakota*, 250 U. S. 118; *Lacoste* v. *Department of Conservation*, 263 U. S. 545. Wild life taken, killed, possessed or shipped in violation of State law is, of course, contraband, and Congress may close the channels of interstate commerce to same, just as it may close the channels of interstate commerce to the movement or stolen or other illegally possessed goods. Furthermore, in so far as the statutes referred to deal with the transporta on of migratory birds, they can be justified under the treaty making power of the United States and the Migratory Bird Treaty between the United States and Great Britain concluded on August 16, 1916.

In the Circuit Court of Appeals counsel for the defendant also relied upon the case of *Griswold* v. *President of the United States*, 82 Fed. (2d) 922. That case, however is no aid to the solution of the problem we have here. In that case was involved the

constitutionality of the Act of Congress known as the Connally Act, approved February 22, 1935 (15 U. S. C. A., Sections 715-715l). That Act simply prohibits the shipment in interstate commerce from a State of oil which has been produced in violation of the laws of that State. *It does not attempt to close the channels of interstate commerce to oil produced in a State when such production does not violate the laws of the State of production.* Assuming the laws of a State controlling the production of oil are valid, it may be admitted that the Federal government, under the commerce clause, may co-operate with the State government in the enforcement of its conservation statute to the extent of prohibiting the channels of interstate commerce from being used by the *oil producers of that State* to violate the production statutes thereof. That is to say, if Texas has a valid statute regulating the production of oil and making it illegal to produce oil in excess of the limits fixed by the statute, we can perceive of no sound reason why Congress may not provide that the excess over that allowed under the laws of Texas shall not be shipped out of Texas in the channels of interstate commerce. Such an Act does not operate to give to the laws of Texas extra-territorial effect. *A very different situation is presented, however, if the Act of Congress should go further and provide that no oil produced in Kentucky, or any other State having no limitation upon production, shall be shipped into Texas.*

POINT 2.

Congress Has No Power to Exclude From Interstate Commerce Convict-made Goods Unless Labeled as Such.

Of course, if Congress has the power to prohibit the shipment of convict-made goods, it would also have the power to require such goods, when offered for shipment, to be so labeled as to indicate that they are convict-made. Such a provision would aid in the enforcement of the prohibitory provision. On the other hand, if Congress does not possess the power to prohibit the shipment of convict-made goods, then the labeling provision cannot be sustained as one in aid of the prohibitory provision. It was suggested in the lower court, however, and we presume will be argued here, that Congress has the power to require convict-made goods to be labeled as such, in order to protect the public against deceit, fraud and imposition. If the labeling of plaintiff's convict-made goods, or any other convict-made goods, could be said to have any real relation to the quality of the material or workmanship in the article, then there might be some justification for requiring convict-made goods to be labeled as such. But how can the label "convict-made" possibly disclose to the public any information as to whether the article is of inferior quality or workmanship? *Such a label does not show the quality of the material out of which the article is made, nor does it show the character of workmanship. There is no justification whatever for any assumption of inferiority in a convict-made article as compared to a similar ar-*

ticle manufactured with free labor. There is just as much justification for assuming that goods made in one factory by free labor are inferior to goods made in some other factory by free labor; or that goods made in some factories by free labor are inferior to goods made in other factories by prison labor. If there is any ground for assuming that the *workmanship* or material of prison-made goods is of an inferior quality, that inferiority would be just as apparent without branding as would be such inferiority in competing goods made by free labor; and to require the branding of prison-made goods in order to notify the public of their inferiority, without requiring a corresponding branding of inferior goods made by free labor, would be the rankest kind of arbitrary discrimination. *Moreover, to reach the conclusion that any part of the Act here involved was enacted to protect the buying public against fraud or deceit is to convict Congress of a willingness to protect the people of some States against fraud and deceit in the sale of convict-made goods, and to leave others unprotected.* The statute makes no provision for the labeling of any convict-made goods shipped into those States where there are no restrictions upon the sale of such goods. All it requires as to shipments to such States is that the *container* shall be labeled, thus leaving the merchant free, after he has received the goods, to take them out of the container and sell them, without any notice to the public that they are convict-made.

The fallacy of the argument that such a label tends to protect against fraud and imposition is thoroughly exposed in the case of *People* v. *Hawkins,* 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490. In that case there was

involved the power of the Legislature of New York to require convict-made goods to be so labeled as to indicate that fact. The court pointed out that convict-made goods are not of themselves detrimental to the health, morals, safety or general welfare of the public, and that the only purpose to be served by the legislation was to place convict-made goods at a disadvantage in competition with goods made by free labor, and that the State cannot use its police power for any such purpose. The court said (p. 6):

> "We may assume, therefore, that the purpose of the law was to promote the welfare of the laboring classes by suppressing, in some measure, the sale of prison-made goods. Waiving for the present the question whether the means employed can ever in the nature of things accomplish the end in view, it is quite clear that unless this statute in some degree affects the value of certain articles of merchandise by restricting the demand or imposing conditions upon the right to deal in them as property, in order to exclude them from the market, it is a mere *brutum fulmen*. The scrubbing brush in question was beyond all doubt an article of property in which the defendant could lawfully deal. He is forbidden, however, by this statute, under all the penalties of the criminal law, from buying or selling or having it in his possession, except upon the condition that he shall attach to it a badge of inferiority, which diminishes the value and impairs its selling qualities. It is not claimed that there is any difference in the quality of this scrubbing brush when compared with one of the same grade or character made out-

side the prisons. There is no pretense that the Act was passed to suppress any fraudulent practice or that any such practice existed with respect to such goods. The validity of the law must depend entirely upon the exercise of the police power to enhance the price of labor by suppressing through the instrumentality of the criminal law, the sale of the products of prison labor.

"The citizen can not be deprived of his property without due process of law. * * * Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment and the practical effect and operation that they may have upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection. * * *

"It is entirely safe to assert that no court has yet invoked the police power to justify a statute, the purpose of which was to enhance the wages of labor in certain factories, by suppressing, through the agencies of the criminal law, the sale of competing products made in prisons. If the wages of labor in a few factories producing goods such as are also made in prisons may be regulated by the police power, there is no reason why that power may not be used to regulate the rewards of labor in any other field of human exertion. That all legislation of this character, with this end in

view, which subjects the individual to criminal prosecution unless he will comply with regulations in the sale of such goods that are intended to depress their value or demand in the market, is in violation of the Constitution, can not be doubted.

"It would be trifling with the Constitution to attempt to uphold this law on the ground that all producers or vendors of goods may be required to tell the truth concerning them, both as to their quality and the means by which or the place where they were manufactured. A knowledge of the truth concerning the origin of every article of property which is the subject of sale, trade or commerce can not be essential to the public welfare, and even if it was the law could be effective only when applied to all property alike and not limited to articles made in certain places and by a certain class of workmen. Any attempt to carry the police power to such an extent as to require the owner of an article of property kept for sale, such as a scrubbing brush, to label it with a history of its origin and to indicate the place where it was made and the class of workmen that produced it, and to enforce such regulations by the aid of the criminal law, must be regarded as an inexcusable and intolerable invasion of the rights and liberty of the citizen."

In 211 Mass. 605, 98 N. E. 334, 27 Am. & Eng. Ann. Cas. 815, there is an opinion of the Justices of the Supreme Judicial Court of Massachusetts, delivered in response to a request of the Legislature, as authorized by the laws of that State, for an opinion as to the constitutionality of a proposed law of Massachusetts

requiring all convict-made goods, whether made in Massachusetts or elsewhere, to be so labeled as to indicate that they were convict-made, before being exposed for sale. The court held that such a law could not be upheld. While the specific ground upon which the court based its opinion was that as to goods made in other States the proposed legislation would be a burden on interstate commerce, yet the opinion clearly discloses that it was the view of that court that such a regulation, even as to goods manufactured in Massachusetts, was an improper exercise of the police power. The court said (p. 607):

> "Plainly the purport of the bill is to affect the availability and attractiveness in the market of the branded or labeled goods. There is nothing wrong in the nature of things in prison ... goods. The employment of those convicted of crime in healthful labor is recognized as a necessity of confinement, whether its end be punitive or reformatory. The learning of useful trades has been established by statute as a part of the policy of this Commonwealth in the discipline and improvement of those paying the penalty prescribed for the commision of crime. It is a part of intelligent humanitarianism in the treatment of those under sentence. Such goods are not unsanitary or so inferior in quality that their sale would constitute a fraud on the public. This is manifest from the bill, which in section 5 excepts from its terms goods, wares and merchandise used by the Commonwealth, or by any county or municipality therein, or by any public institution. It can not be presumed that the general public needs

a protection in these respects which is denied to instrumentalities of government and to benevolent, educational, and other charitable and public institutions. Differences in grade of workmanship, if there are any, would be as apparent without branding as in like products made in private shops."

The next to the last sentence in this quotation is peculiarly applicable to the Act here under consideration, in view of the provision of Section 1 exempting from the provisions of the Act goods manufactured in Federal prisons for the use of the Federal Government.

State statutes requiring dealers in convict-made goods to take out a license and to give a bond, pay an annual license fee, and to make annual statements disclosing their transactions in such goods, have been held unconstitutional on the ground that such legislation is arbitrary and unreasonable. See: *People* v. *Raynes,* 120 N. Y. Supp. 1053, affirmed in 198 N. Y. 539.

The case of *Ex Parte Charles E. Hayden,* 147 Calif. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, did not involve the right of the State to require the labeling of convict-made goods, but did involve the same principle. The law involved in that case required all boxes, barrels or packages containing fruit exposed for sale in California to be so stamped as to correctly show the county and immediate locality in which such fruit was grown. The court held that this was unconstitutional legislation and beyond the police power of the State. It was pointed out that the only effect of the Act was to give the growers of fruits in those sections of the State

which had established a reputation for fine fruit an advantage over those growers of fruit located in other sections, and that the police power of the State could not be exercised for any such purpose.

In *Matter of Foley,* 172 Calif. 744, 158 Pac. 1034, there was involved the validity of an Act of California requiring every dealer selling imported eggs to stamp on each egg the word "Imported," and to display on his place of business a sign reading "Imported Eggs Sold Here." The court held that this was not a valid exercise of the police power of the State; that the law did not require such dealers to disclose the *age of the eggs;* and that the mere fact that the eggs were imported did not justify the conclusion that they were any older or any less fit for use than domestically produced eggs sold in competition with them. The necessary effect of the Act was thus described by the court:

> "Its only result would be not to protect the public from the sale of stale eggs, but to aid the domestic producer by appealing to the prejudices of people against eggs produced in foreign lands."

Similarly, the labeling of convict-made goods or the containers thereof cannot have the effect of protecting the public against fraud or imposition. Such labeling can only serve to enable those competitors whose products are made by free labor to appeal more effectively to the prejudices which may exist with some classes of our people against convict-made goods.

In the case of *Matei* v. *Hecke,* 99 Calif. App. 747, 279 Pac. 470, there was involved an Act of the State

of California requiring that grapes in containers other than those packed in sawdust, cork, etc., and in certain standard containers established by the Act, could be sold only when the container was labeled in conspicuous letters "Irregular Container." The court held that such a requirement would not have the effect of assuring the purchaser that he was getting a certain quantity or quality of grapes, and that therefore the requirement of the Act could not be regarded as a valid exercise of the police power of the State to protect the public from short weights, dishonest packing, inferior goods, and the like.

Doubtless, the case of *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, will be relied upon by counsel for the defendant. That case involved the validity of a statute of the State of Oregon under which the proper State authority had prescribed standard containers for raspberries and strawberries. The court simply held that the regulations could not be considered arbitrary or capricious, since the *regulations bore a reasonable relation to the protection of buyers of strawberries and raspberries, and to the preservation of such fruits.*

The case of *Detweiler* v. *Welch,* 46 Fed. (2d) 75, which will probably be cited by counsel for the defendant is easily distinguishable from the case we have here. That case involved the validity of an Idaho law requiring the grading of potatoes and the marking of the containers to show the grade when the potatoes are shipped to another State. It was claimed that the law was not a valid exercise of the police power, and

also constituted an unconstitutional burden on interstate commerce. The Act required that when the potatoes did not conform to the quality, grade and size of some of the other grades fixed by the statute, the container should be marked with the words "Cull Potatoes." It was urged that as potatoes are useful and harmless articles of commerce, to require a certain grade of sound potatoes to be branded as culls would indicate to the consuming public in distant States that they were unfit for human consumption. The court held that no such deduction could be fairly drawn from such marking; that the real theory and purpose of the Act was to promote the marketability of the product, and that the grading of the product according to its size and to the further rules laid down in the Act was to enable the seller to demand and obtain for his product the prices which its particular quality and grade entitled him to receive.

This court, of course, judicially knows that not only are potatoes sold by grade, but that fruit, tobacco, wheat, corn, cotton, wool and many other products are also sold according to the respective grades into which they fall according to market practices, or, in some cases, according to statutory provisions. *The grading in all these cases is based upon the inherent difference in value and quality of the articles falling in the respective grades.* Thus, No. 1 wheat brings a better price than No. 2, and No. 1 corn a better price than No. 2 corn. Leaf tobacco brings a better price than lugs, and lugs usually a better price than trash. *The Idaho Potato Grading Act simply recognizes this*

inherent difference in the grade of potatoes and requires them to be labeled accordingly. This invades no property right of the owner of those potatoes. The law, as does their own inherent quality, simply requires them to be labeled for what they are.

Horse collars and harness, manufactured by convict labor, however, by no trade practice and by no inherent inferiority fall into a class or a grade different from similar goods manufactured by free labor.

Although there was no proof in the record to support same, the District Judge in his opinion made this statement (R. 35, 36):

> "It has been the practice in some instances of persons dealing in convict-made goods to represent that the manufacturing was done in free institutions and by skilled labor. The Federal Trade Commission has found this to be an unfair trade practice. See the proceedings of that body In the Matter of Commonwealth Manufacturing Company and Harry Dushoff, doing business under the trade names and styles of Harry Dushoff & Company and Chicago Manufacturing Company, Docket No. 1367."

We apprehend that the Federal Trade Commission case referred to by the District Judge will be relied upon here. That case is reported in Volume 11, Federal Trade Commission Decisions, at page 133. We have been unable to find in that decision the slightest intimation that the parties complained of in that proceeding were representing that the goods sold by them were manufactured *"in free institutions and by skilled*

labor." That proceeding arose from a complaint before the Federal Trade Commission that the Commonwealth Manufacturing Company, largely owned by Harry Dushoff, and Harry Dushoff, doing business under the trade names of Harry Dushoff & Company and Chicago Manufacturing Company, were engaging in unfair trade practices. The complaint was that these concerns were engaged in the sale of binder twine, work shirts and shoes, and that in advertising them they represented that they were the manufacturers of these articles, and that by buying from them the public would save the middleman's profit. It was also charged that the shoes sold by these concerns were branded on the soles with the letters "U. S." in large type, and in smaller type with the words "Munson Army Last," it being claimed that the concerns complained of were thus representing to the buying public that those shoes were made for the United States Army. While it is true the record shows that the respondents in that case purchased the articles sold by them from the State Penitentiary factory at Michigan City, yet the case contains not the slightest intimation that any complaint was made that the concerns were representing that the articles sold by them were manufactured in free institutions and by skilled labor. The Commission held that the advertisement of the concerns that they were the manufacturers of the goods sold, and that purchasers buying from them would be buying direct from the factory had the capacity and the tendency to mislead the purchasers of those articles into the erroneous belief that the concerns were the

manufacturers thereof, and that in purchasing from them the purchasers would be saved the cost and profits of middlemen; and that the misbranding of the shoes had the capacity and the tendency to mislead and deceive the purchasers thereof into the belief that they were buying regular army shoes made for the use of the United States Army.

We therefore submit that neither the record in this case nor the record in the Federal Trade Commission case justifies any inference that there is any practice prevalent among the manufacturers or sellers of convict-made goods of palming off their goods as having been made in free institutions and by skilled labor; and *there is no proof in this record that the convicts employed by plaintiff are not skilled workmen,* nor is there any legal presumption to that effect.

Of course, cases upholding statutes requiring the labeling of products which readily lend themselves to deception, or which are easily capable of adulteration, are not in point here.

POINT 3.

Section 1 of the Act Is Invalid Even if Congress Possesses Power to Require Labeling.

If it be conceded that Congress has the power to require convict-made goods to be so labeled as to conform to the laws of the State of destination, we think this Act must be declared invalid nevertheless. The Act not only operates to require labeling where the laws of the State to which the goods are shipped

require labeling, but it also operates to absolutely prohibit shipment in interstate commerce to those States which prohibit the sale of convict-made goods, if intended to be used in violation of the laws of such States. Section 1 of the Act is prohibitory in character ter and in express language. It unconditionally prohibits shipment in interstate commerce for sale if the State of destination prohibits the sale. It prohibits shipment in interstate commerce for sale without labeling if the law of the State of destination requires such labeling. We think we have demonstrated that Congress is without power to prohibit shipment in interstate commerce of useful and harmless articles of commerce manufactured by prison labor, and the delivery thereof to the consignee, even though the law of the State of residence of the consignee prohibits the sale of such articles. Certainly, however, it was the intention of Congress by Section 1 of this Act to prohibit such shipment, just as much as it was to prohibit shipment without labeling into those States requiring labeling; and it would seem that Section 1 cannot be so dissected as to sustain the provision prohibiting shipment without labeling, and to invalidate the provision prohibiting shipment altogether.

We are informed that at least twenty-two States of the Union have enacted legislation either prohibiting or regulating the sale of convict-made goods, and of those twenty-two States fifteen either prohibit the sale of all or most kinds of convict-made goods. The purpose of the Act here involved was to make those laws effective as against shipments from other States,

and the purpose was to make the laws of each of those States effective, not merely the laws of those States whose regulations stop short of prohibition of the sale of convict-made goods. To so construe Section 1 of the Act as to make it apply to shipments to the seven States regulating the sale of convict-made goods therein by labeling or similar requirements, and not apply to the fifteen States whose laws are prohibitory in character, would not only disregard the plain intent of Congress, but would amount to legislation by the courts, in violation of a thoroughly settled principle of statutory construction. The courts are powerless to so construe the statute as to give it a less scope than was intended by the legislative department. *There is no escape from the proposition that by Section 1 of the Act, Congress intended to close the channels of interstate commerce to convict-made goods intended to be used in violation of the laws of any State, whether those laws merely require labeling before sale, or entirely prohibit sale.* We think, under numerous opinions of this court, Section 1 in its entirety must be stricken down, even though some of its provisions may be within the scope of congressional power.

In the *Employers' Liability Cases,* 207 U. S. 463, the court had under consideration the first Railroad Employers' Liability Act. The court held that that Act upon its face made any common carrier engaged in interstate commerce liable to its employees for injuries or death resulting from the negligence of the company or its employees, irrespective of whether the employee was engaged in interstate commerce at the

time of the injury or not. It was held that Congress does not have the power to legislate on the liability of an interstate carrier for damages not inflicted in interstate activities, or in activities directly affecting interstate commerce; that where the damages are sustained in a purely intrastate activity, the matter is beyond the reach of Congress, and, as the law under consideration made no distinction but was universal in its application, the entire Act must fail.

In the so-called *Trade-Mark Cases,* 100 U. S. 82, there was involved an Act of Congress providing for the registration of trade-marks used in connection with a business and for the protection of the owner of such trade-mark against infringement. The Act by its terms was universal in its application, whether the business in connection with which the trade-mark was used was interstate or intrastate in character. The court held that Congress has no power to provide for the registration and protection of trade-marks used exclusively in intrastate business, and, as the Act covered such trade-marks as well as those used in interstate business, it must fail in its entirety. See also: *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126; *James* v. *Bowman,* 190 U. S. 127; *Illinois Central Railroad Co.* v. *McKendree,* 203 U. S. 514; *United States* v. *Ju Toy,* 198 U. S. 253; *United States* v. *Reese,* 92 U. S. 214; *Baldwin* v. *Franks,* 120 U. S. 678. Some of these cases deal with criminal statutes, but the principle is the same, whether applied to a criminal statute or one dealing with property rights.

POINT 4.

Section 2 Must Fall: First, Because Congress Is Without Power to Require Containers to be Labeled; and Second, Because It Is Not Separable From the Other Provisions of the Act.

We now come to a consideration of Section 2 of the Act, which requires that all containers of convict-made goods shipped in interstate commerce shall be plainly marked on the outside thereof so as to show, among other things, the nature of the contents and the name and location of the prison institution where the goods were produced or manufactured.

It seems quite clear that if Congress does not have the power to require the articles themselves to be marked "convict-made," it is without power to require the containers to be so marked as to indicate that their contents were manufactured by convict labor. Certainly the marking of the containers so as to stamp the contents as convict-made can in no way aid or facilitate movement in interstate commerce. Just as is true of the labeling of the goods themselves, the only purpose served is to publish the fact that the contents are convict-made, and thereby probably affect their salability to certain classes of people.

Putting all this aside, however, it seems to us that Section 2 must be declared invalid under well settled principles of law if Section 1 is held invalid. The Act has only four sections, and contains no separability clause. The general rule is that courts, in construing

legislative enactments, must proceed upon the assumption that the legislature intended the Act to be effective in its entirety. The Act will not be so construed as to eliminate an unconstitutional or otherwise invalid part, and leave in effect the unobjectionable parts, unless it appears to the court from an examination of the Act that legal effect can be given to the unobjectionable part standing alone, and *that the legislature intended the unobjectionable part to stand, even though other parts of the Act should be held invalid; and the presumption is against any such intention on the part of the legislature.* *Williams* v. *Standard Oil Co.*, 278 U. S. 235, at pages 241, 242; *Carter* v. *Carter Coal Co., et. al.*, 298 U. S. 238; *Hill* v. *Wallace*, 259 U. S. 44; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330. Guided by this rule, it seems to us that Section 2 must fall if Section 1 is invalid. How can it be said that it was the intention of Congress that Section 2 shall stand if Section 1 is eliminated? The whole Act proclaims that it was the purpose of Congress not merely to require labeling of the containers of convict-made goods, but to absolutely prohibit shipment of such goods if intended to be used in violation of the laws of the State to which they are consigned. Not only does the context of the Act show this to have been the purpose of Congress, but the title as well. The title reads as follows: "An Act to prohibit the interstate transportation of prison-made products in certain cases." With this declaration of the purpose of Congress in the title, reinforced by the language of

the Act itself, there is simply no escape from the proposition that what Congress had in mind in this legislation was *prohibition of shipments, not labeling of containers.* Undoubtedly, the title of the Act may, and should be, taken into consideration in determining the intent of Congress.

This court stated in the case of *United States* v. *Fisher,* 2 Cranch, 358, 386:

> "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

In the case of *Church of Holy Trinity* v. *United States,* 143 U. S. 457, 462, this court said that while the title of an Act may not be used to add to or take from the body of the statute, yet it "may be considered in determining the intent of the Legislature." See also: *White* v. *United States,* 191 U. S. 545; *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

CONCLUSION.

In conclusion, we respectfully ask the court to contemplate the results which may be expected to flow from sustaining the principle underlying this statute. If Congress can close the channels of interstate commerce to prison-made goods for the purpose of protecting free labor from competition with cheap prison labor, there is no reason why similar legislation, not-

withstanding the case of *Hammer* v. *Dagenhart*, cannot be sustained with reference to the products of child labor. It is generally believed that organized labor receives higher wages than unorganized labor. It is already the policy of the Federal Government to give preference in government contracts for labor or materials to those concerns which recognize the unions and bargain collectively with their men. If this law is upheld, it is only a step further for Congress to prohibit the movement in interstate commerce of articles manufactured by open shop concerns. Every one knows that negro labor and the unorganized white labor of the South, generally speaking, are not as well paid as is organized labor in the East and North. Therefore, on the claim that the products of this cheaper labor unfairly compete with products produced by the higher paid labor of the North and East, the channels of interstate commerce could be closed to the movement of the more cheaply produced articles into unionized territory. Again, should Congress conclude that the closed shop principle is harmful to the public welfare and imposes too great a burden upon the consumer, then, under the principle contended for here, it would seem permissible for Congress to close the channels of interstate commerce to articles manufactured by concerns operated on the closed shop principle. If the principle contended for here is sustained, what is to prevent Congress from closing the channels of interstate commerce to merchandise manufactured in sweat shops and from requiring goods so manufactured to be labeled as having been made in

sweat shops? The eight-hour day has come to be recognized by many States as desirable in many occupations. Under the principle here contended for, Congress could prevent the shipment of articles of commerce from States not observing the eight-hour day into those States which do observe it, on the ground that such legislation would tend to protect labor in those States observing the eight-hour day.

The foregoing are but a few examples of the results which can be expected to logically follow the establishment of the principle here contended for by the supporters of the Act, and it seems to us that they are sufficient to compel its rejection.

Respectfully submitted,

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